

initiation of the adversary adjudication. Unaudited financial statements are acceptable for individual applicants as long as the statement provides a reliable basis for evaluation, unless the administrative law judge or the Board otherwise requires. Financial statements or reports filed with or reported to a Federal or State agency, prepared before the initiation of the adversary proceeding for other purposes, and accurate as of a date not more than three months prior to the initiation of the proceeding, shall be acceptable in establishing net worth as of the time of the initiation of the proceeding, unless the administrative law judge or the Board otherwise requires.

(2) In the case of applicants or affiliates that are not banks, net worth shall be considered for the purposes of this subpart to be the excess of total assets over total liabilities, as of the date the underlying proceeding was initiated, except as adjusted under § 263.103(c)(5). The net worth of a bank holding company shall be considered on a consolidated basis. Assets and liabilities of individuals shall include those beneficially owned.

(3) If the applicant or any of its affiliates is a bank, the portion of the statement of net worth which relates to the bank shall consist of a copy of the bank's last Consolidated Report of Condition and Income filed before the initiation of the adversary adjudication. Net worth shall be considered for the purposes of this subpart to be the total equity capital (or, in the case of mutual savings banks, the total surplus accounts) as reported, in conformity with applicable instructions and guidelines, on the bank's Consolidated Report of Condition and Income filed for the last reporting date before the initiation of the proceeding.

(c) *Statement confidential.* Unless otherwise ordered by the Board or required by law, the statement of net worth shall be for the confidential use of the Board, counsel for the Board, and the administrative law judge.

§ 263.106 Measure of awards.

(a) *General rule.* Awards shall be based on rates customarily charged by persons engaged in the business of acting as attorneys, agents, and expert

witnesses, provided that no award under this subpart for the fee of an attorney or agent shall exceed \$75 per hour. No award to compensate an expert witness shall exceed the highest rate at which the Board pays expert witnesses. An award may include the reasonable expenses of the attorney, agent, or expert witness as a separate item, if the attorney, agent, or expert witness ordinarily charges clients separately for such expenses.

(b) *Determination of reasonableness of fees.* In determining the reasonableness of the fee sought for an attorney, agent, or expert witness, subject to the limits set forth above, the administrative law judge shall consider the following:

(1) If the attorney, agent, or expert witness is in private practice, his or her customary fee for like services;

(2) The prevailing rate for similar services in the community in which the attorney, agent, or expert witness ordinarily performs services;

(3) The time actually spent in the representation of the applicant;

(4) The time reasonably spent in light of the difficulty or complexity of the issues in the proceeding; and

(5) Such other factors as may bear on the value of the services provided.

(c) *Awards for studies.* The reasonable cost of any study, analysis, test, project, or similar matter prepared on behalf of an applicant may be awarded to the extent that the charge for the service does not exceed the prevailing rate payable for similar services, and the study or other matter was necessary solely for preparation of the applicant's case and not otherwise required by law or sound business or financial practice.

§ 263.107 Statement of fees and expenses.

The application shall be accompanied by a statement fully documenting the fees and expenses for which an award is sought. A separate itemized statement shall be submitted for each professional firm or individual whose services are covered by the application, showing the hours spent in work in connection with the proceeding by each individual, a description of the specific services performed, the rate at which

each fee has been computed, any expenses for which reimbursement is sought, the total amount claimed, and the total amount paid or payable by the applicant or by any other person or entity for the services performed. The administrative law judge or the Board may require the applicant to provide vouchers, receipts, or other substantiation for any expenses claimed.

§ 263.108 Responses to application.

(a) *By counsel for the Board.* (1) Within 20 days after service of an application, counsel for the Board may file an answer to the application.

(2) The answer shall explain in detail any objections to the award requested and identify the facts relied on in support of the Board's position. If the answer is based on any alleged facts not already in the record of the proceeding, the answer shall include either supporting affidavits or a request for further proceedings under § 263.109, or both.

(b) *Reply to answer.* The applicant may file a reply only if the Board has addressed in its answer any of the following issues: that the position of the agency was substantially justified, that the applicant unduly protracted the proceedings, or that special circumstances make an award unjust. Any reply authorized by this section shall be filed within 15 days of service of the answer. If the reply is based on any alleged facts not already in the record of the proceeding, the reply shall include either supporting affidavits or a request for further proceedings under § 263.109, or both.

(c) *Additional response.* Additional filings in the nature of pleadings may be submitted only by leave of the administrative law judge.

§ 263.109 Further proceedings.

(a) *General rule.* The determination of a recommended award shall be made by the administrative law judge on the basis of the written record of the adversary adjudication, including any supporting affidavits submitted in connection with the application, unless, on the motion of either the applicant or Board counsel, or sua sponte, the administrative law judge or the Board orders further proceedings to amplify the

record such as an informal conference, oral argument, additional written submissions, or an evidentiary hearing. Such further proceedings shall be held only when necessary for full and fair resolution of the issues arising from the application and shall be conducted promptly and expeditiously.

(b) *Request for further proceedings.* A request for further proceedings under this section shall specifically identify the information sought or the issues in dispute and shall explain why additional proceedings are necessary.

(c) *Hearing.* The administrative law judge shall hold an oral evidentiary hearing only on disputed issues of material fact which cannot be adequately resolved through written submissions.

§ 263.110 Recommended decision.

The administrative law judge shall file with the Board a recommended decision on the fee application not later than 30 days after the submission of all pleadings and evidentiary material concerning the application. The recommended decision shall include written proposed findings and conclusions on the applicant's eligibility and its status as a prevailing party and, if applicable, an explanation of the reasons for any difference between the amount requested and the amount of the recommended award. The recommended decision shall also include, if at issue, proposed findings as to whether the Board's position was substantially justified, whether the applicant unduly protracted the proceedings, or whether special circumstances make an award unjust. The administrative law judge shall file the record of the proceeding on the fee application upon the filing of the recommended decision and, at the same time, serve upon each party a copy of the recommended decision, findings, conclusions, and proposed order.

§ 263.111 Action by the Board.

(a) *Exceptions to recommended decision.* Within 20 days after service of the recommended decision, findings, conclusions, and proposed order, the applicant or counsel for the Board may file written exceptions thereto. A supporting brief may also be filed.